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CARRIAGE OF MAIL ON VESSELS OF U.S. REGISTRY

JUNE 10 (legislative day, JUNE 9), 1986.—Ordered to be printed

Mr. DANFORTH, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 186]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 186) to further the development and maintenance of an adequate and well-balanced American merchant marine by requiring that certain mail of the United States be carried on vessels of United States registry, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE OF BILL

The bill S. 186, as reported, would add a new section to title IV of the Merchant Marine Act, 1936, that requires the Postal Service to use vessels of U.S. registry, if available, to originate any international sea transportation of mail.

BACKGROUND AND NEEDS

The importance of the carriage of mail was recognized at the foundation of the United States in the constitutional provision which empowered Congress to establish post offices and post roads (U.S. Const. art. I, sec. 8, cl. 7). This power was early construed by the Supreme Court to include "all measures necessary" to secure the "safe and speedy transit" of the mail. Ex parte Jackson, 99 U.S. 727 (1878). For this purpose, the U.S. Government entrusted the international waterborne transportation of U.S. mail to U.S.-flag carriers.

As early as 1891, legislation authorized the Postmaster General to contract with American citizens for the carrying of mail on U.S.

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vessels. Later modifications in the law strengthened this authority and required that all mail originating in the United States be carried by U.S.-flag vessels. The Merchant Marine Act, 1920 contained a provision which, in effect, prohibited the use of foreign-flag vessels for international mail carriage (41 Stat. 998), which was retained during the 1928 modification of the act. The U.S.-flag requirement was again included in the Merchant Marine Act, 1936 (49 Stat. 1985).

In 1960, Congress enacted the first of a series of revisions of title 39, United States Code, dealing with the postal statutes (74 Stat. 578). This revision included a provision very similar to the provision previously embodied in the Merchant Marine Act, 1936. In 1970, Congress again passed a complete revision of title 39 (84 Stat. 719), but this legislation did not contain a provision preserving the U.S.-flag preference. The House and Senate committee reports on the revision discuss only briefly the need to reduce restrictions imposed on the Postal Service to procure transportation services (H. Rept. 91-1104 at 5; S. Rept. 91-912 at 17). The intent of Congress is further blurred by language in the House report which suggests that the House intended to continue the preference laws of the Merchant Marine Act, 1936 with respect to the sea transportation of mail (H. Rept. 91-1104 at 38).

Notwithstanding the absence of an explicit requirement in the 1970 revision, the Postal Service continued the U.S.-flag preference by a regulation in its Contracting Manual until 1981, at which time the regulation was deleted without notice or hearing. This administrative change brought forth a rapid transformation from the use of U.S.-flag carriers to foreign-flag carriers in transporting mail abroad. By 1983, foreign-flag carriers were awarded 37 of the 45 contracts let by the Postal Service.

S. 186, as reported, restores the longstanding U.S. preference which was deleted by administrative fiat. In so doing, it is in furtherance of the objectives of the Merchant Marine Act, 1936 (46 App. U.S.C. 1101 et seq.), which declares it to be in the national interest to maintain a healthy merchant marine both for the national defense and for the development of foreign commerce. Moreover, while not a panacea for the U.S. liner fleet which is faced with serious financial difficulties due in part to increased competition from subsidized foreign carriers, the restoration of the U.S.-flag preference will contribute to the revitalization of the liner companies by providing additional cargoes.

The Postal Service has expressed opposition to S. 186 on the grounds that the provisions of the bill would increase postage rates and impose burdens on the administration of mail service. The Committee recognizes that the Service does have a legitimate interest in assuring competent mail service at a reasonable cost. However, the Committee feels that potential problems which might arise from S. 186 can be avoided through effective rulemaking and stipulations in contracts with U.S. carriers.

Finally, the legislation should not be viewed as inconsistent with the administration's general position of maintaining the scope of cargo preference as it existed prior to the decision in *Transportation Institute* v. *Dole* 603 F. Supp. 888 (D.D.C. 1985). S. 186 reinstates one element of the cargo preference scheme that was in

effect for 60 years prior to its deletion from the Postal Service's Contracting Manual and would have continued in effect but for the administrative action by the current administration on May 10, 1981.

Legislative History

A similar bill, S. 188, was introduced by Senator Inouye on January 26, 1983. Hearings were held on the bill on September 27 and 29, 1983, by the Committee. Witnesses included representatives of the U.S. Postal Service, the Maritime Administration, major U.S. shipping companies, Shipbuilders Council of America, Marine Engineers Beneficial Association, Maritime Trades Department of the AFL–CIO, and the U.S. Chamber of Commerce. The Committee also received several written statements for the record. On April 10, 1984, the Committee ordered reported S. 188 with an amendment in the nature of a substitute.

S. 188, as reported, was not considered by the full Senate during the 98th Congress. Senator Inouye introduced the identical legislation as S. 186 on January 3, 1985. No further hearings were held on the issue, and the Committee ordered reported S. 186 without objection on March 13, 1986.

Summary of Major Provisions

S. 186 would: (1) Require the use of U.S.-flag vessels, if available, for the international sea transportation of mail originating in the United States; (2) impose limitations on the amount each carrier can charge the Postal Service; (3) require contract awards to be based on competitive bidding; (4) limit the Postal Service's ability to reject bids based on non-cost factors; and (5) exclude ferryboats and ocean tramps from preferential status.

Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, DC, June 5, 1986.

Hon. John C. Danforth,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 186, a bill to further the development and maintenance of an adequate and well-balanced American merchant marine by requiring that certain mail of the United States be carried on vessels of United States registry, as ordered reported by the Senate Committee on Commerce, Science, and Transportation, March 13, 1986. This estimate supersedes the previous CBO letter on S. 186, dated April 22, 1986.

With certain exceptions, this bill would require the Postal Service to contract only with vessels of U.S. registry to originate inter-

national sea transportation of U.S. mail. This could result in a significant cost increase to the United States Postal Service (USPS) if U.S. carriers raise their rates for international transport of mail in the absence of foreign competition. However, we have no firm basis at the present time for predicting the amount of any increase and the resulting cost to the Postal Service. Any increase in cost to the USPS would ultimately be recovered by increases in postal rates. Under CBO's baseline assumptions, a general postal rate increase is assumed to occur in January 1989. Costs incurred prior to that time would result in increased net outlays, which would be recovered through postal rates in subsequent years.

The U.S./foreign cost differential has dropped substantially in recent years because of the increasing trade imbalance and the extensive competition it has created for outgoing shipment of U.S. mail. Contract bids by U.S. shippers are currently about 5 percent higher than actual foreign contracts, as compared to a differential of about 35 percent just two years ago. Foreign competition is now so keen that, in its absence, rates could increase by more than the present 5 percent differential. On some shipping routes there would be only one available bidder where today there are several.

In order to assess the possible impact of this bill on rates charged by U.S. shippers on international routes, CBO has compared costs of mail shipments on offshore domestic routes (which have no foreign competition) with a sample of international routes. The sample international routes are similar to the offshore domestic routes with respect to sailing frequency, sailing time, and equipment requirements—but the offshore domestic routes have average unit costs that are much higher than those in the sample of international routes. The average cost per mile to ship a 40-foot container of mail is $1.31 on the sample offshore domestic routes. In comparison, it costs $0.19 per mile on the sample international routes. While there are a number of factors that contribute to this difference, the presence of foreign competition may be one of the significant factors holding down costs on the international routes.

However, conditions in international markets are difficult to predict and subject to change with variations in international trade. Thus, rates in markets affected by this bill may not reflect the differentials displayed in the sample routes. Our review of this bill points to several factors that will tend to mitigate any rate increases. First, the current depressed state of the domestic shipping industry has resulted in high levels of competition among U.S. flag carriers. Therefore, on at least some routes, there is likely to be significant competition, even in the absence of foreign carriers. Second, S. 186 allows the USPS to continue contracting with foreign vessels if American flagships are not available at the time of transportation, or if U.S. vessels cannot provide sufficient service. Such contract flexibility could limit some of the increase that otherwise might occur in the absence of foreign competition. Third, costs could also be held down if USPS establishes a like-goods standard for mail under section 405(b) of the bill. This rulemaking procedure would set a cap on rates by tying them to the cost of shipping similar goods.

Enactment of this legislation is not expected to result in any signficant costs to state or local governments.

If you wish further details of this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

RUDOLPH G. PENNER, *Director.*

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

Enactment of S. 186 would bring rates charged by U.S. shipping companies for carriage of U.S. international mail under regulation by the Federal Maritime Commission (FMC). The role of the FMC will largely be limited to investigating violations of the Shipping Act of 1984 upon complaint or its own motion. Given the small number of contracts and competitive award process, it is likely that S. 186 will have a negligible regulatory impact. S. 186 will reduce the total number of carriers which will compete for postal contracts. As a result, the number of persons covered under the Shipping Act of 1984 will not increase. S. 186 imposes no new economic burdens on common carriers or the FMC. Carriers currently file postal rates with the FMC. Therefore, S. 186 will result in no additional reporting requirements, and no further effect on the number or types of individuals and businesses regulated, the economic impact of such regulation, the personal privacy of affected individuals, or the paperwork required from such individuals and businesses.

SECTION-BY-SECTION ANALYSIS

S. 186 contains two sections. The first section adds a new section 405 to title IV of the Merchant Marine Act, 1936. The second section amends a provision of title 39, United States Code, concerning contract laws applicable to the Postal Service.

SECTION 1

Section 1 adds a new section 405 to the Merchant Marine Act, 1936.

Section 405(a)

Section 405(a) requires the Postal Service to contract for the use of vessels of U.S. registry to originate the international transportation of U.S. mail by sea if the vessel operator provides regular transportation services to the specified destination. The Postal Service is not required to enter into such contracts if there are no available vessels, or if these vessels cannot provide service sufficient to meet the actual needs of the Postal Service.

The Postal Service has suggested that the phrase "actual needs" in section 405(a) be clarified to avoid undue litigation involving contract disputes initiated by unsuccessful bidders. Actual needs are those terms and conditions of service which are reasonable in light of commercial practices within a given trade. The Service may and should articulate its actual needs and criteria to assure

efficient mail service. The enumeration of such factors as transit times and frequency of sailing will also provide adequate notice to carriers of the level of performance required prior to bidding on postal contracts. The Committee notes that the Postal Service Contracting Manual currently requires the Postal Service to state only its "actual minimum needs" in setting specifications for contracts. Section 405(a) is patterned after the Service's existing practice but provides the Service with greater flexibility by deleting "minimum".

Section 405(b)

Section 405(b) sets out a standard to be used to determine reasonable rate ceilings for mail carriage based on rates charged for transporting "like goods" for private persons. This provision is designed to prevent carriers from charging the Postal Service unreasonably high rates. The phrase "like goods" is used by the Department of Defense in setting rates for the carriage of military cargo (10 U.S.C. 2631). It refers to cargoes of similar but not necessarily identical characteristics. Small parcels, packages, cartons, and boxes are such similar cargoes that can be used as the basis by which the Postal Service determines permissible rates.

The Postal Service has expressed concern that carriers will use the "cargo not otherwise specified" (n.o.s.) general tariff as the rate for "like goods" and thereby set unjustifiably high rates for the carriage of mail. This provision is not intended to allow the use of the n.o.s. rate unless it is a fair and reasonable one for similar goods that bear the closest resemblance to mail. The Committee notes, for example, that many carriers have a "Freight All Kinds" (F.A.K.) classification for which a uniform rate is established for various parcels, packages, and other goods. This rate is lower than the cargo n.o.s. rate and may provide a better basis for the determination of reasonable rates.

Section 405(b) also requires that rates charged for the carriage of mail under section 405(a) comply with the provisions of the Shipping Act of 1984, which provides for a nondiscriminatory regulatory process for the common carriage of goods. Carriers are currently required to file rate tariffs with the FMC. This provision confirms that rates must be filed with the FMC and must comply with the provisions of the Shipping Act of 1984. The filing of tariffs will provide other carriers the information necessary to develop reasonable and competitive rates.

The Shipping Act of 1984 permits carriers to enter into conference agreements and set rates. However, the act also provides the FMC with the authority to seek injunctive relief against unreasonable increases in transportation costs (346 App. U.S.C. 1705(g)). In situations where the Postal Service believes that increases in rates are unreasonable, the provisions of the Shipping Act of 1984 will allow the Service to petition the FMC for relief from rates that would result in unreasonable increases in transportation costs. These substantive remedies of the Shipping Act of 1984 should help to protect the Postal Service from unreasonable rates set by a conference of carriers.

Section 405(c)

Section 405(c) requires that contracts be awarded by competitive bidding, and that contracts be limited to one year in duration. The term "competitive bidding" includes both advertised and negotiated procurements. This interpretation is consistent with Federal law relating to Government contracts for property and services (41 U.S.C. 252). The limitation on the duration of contracts, should not impose a restrictive burden on the Postal Service's ability to negotiate favorable contracts. The majority of contracts for the sea transportation of mail are currently one year in duration. Negotiation of contracts of more extended duration could discourage potential competitors and eventually lead to increased prices.

Section 405(d)

Section 405(d) precludes the Postal Service from giving any preference to a carrier on the basis of container size or specifying container size in the invitation for bids or request for proposals unless required by the physical handling limitations of the distination.

The Postal Service has expressed its desire to utilize 20-foot cargo containers on a regular basis in order to expedite mail delivery to areas receiving relatively small quantities of mail. At least one carrier does not use 20-foot containers for mail carriage. The Committee believes that it is important for all U.S. carriers currently transporting mail to be allowed to compete for future awards, irrespective of the size of containers employed, in order to maintain the existing level of competition. Section 405(d) is consistent with the Container Standards Act (41 U.S.C. 253), which prohibits restrictions on advertisements to carry government property based on cargo container size.

This provision is not intended to impose additional costs or hinder mail service and it need not do so. Various options will be available to the Postal Service to offset any logistical problems caused by the use of large containers. For instance, the Service may wish to structure its bidding process in a manner which calculates compensation based on the volume of mail carried every 2 weeks to areas receiving relatively little mail. The Postal Service may also establish delivery schedules based on its actual needs that would require a carrier to depart with 40-foot containers which are only partially filled. To avoid damage to mail in partially filled containers, carriers which wish to employ larger containers might be required to utilize retaining walls, packing, and other techniques. Further investigation and experience may result in identification of other methods of utilizing larger containers in an efficient and cost-effective manner.

Section 405(e)

Section 405(e) provides a definition of "common carrier" which excludes ocean tramps and ferryboats. Ferryboats and ocean tramps are currently excluded from the definition of "ocean common carrier" in the Shipping Act of 1984. These carriers, not subject to regulatory provisions of the Shipping Act of 1984, should not benefit from the cargo enhancement opportunities which S. 186 provides.

SECTION 2

Section 2 adds proposed section 405 of the Merchant Marine Act, 1936, to the contract laws listed in 39 U.S.C. 410(b) as exceptions from the general rule in 39 U.S.C. 410(a) that most public or Federal contract laws are not applicable to the Postal Service.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

THE MERCHANT MARINE ACT, 1936

Title IV of that Act

SEC. 401.–SEC. 404. * * *

SEC. 405. (a) The Postal Service shall contract for the use of vessels of United States registry to originate any international sea transportation of mail of the United States in any case in which the common carrier which operates or controls such vessel is engaged in the provision of regular transportation services to the destination specified by the Postal Service. The Postal Service shall not be required to enter into any such contract if no such vessels are available at the time the Postal Service seeks to arrange for the transportation of such mail, or if no such vessels can provide service sufficient to meet the actual needs of the Postal Service.

(b) Any rate charged for the international sea transportation of mail of the United States under subsection (a) of this section shall comply with the provisions of the Shipping Act of 1984 (Public Law 98-237). Any such rate shall not be higher than rates charged by such carrier for transporting like goods for private persons.

(c) Notwithstanding any other provision of law, in any case in which two or more common carriers seek to enter into a contract offered by the Postal Service under subsection (a) of this section, the Postal Service shall award such contract by competitive bidding and the duration of any such contract may not exceed one year.

(d) The Postal Service shall not give any preference to any common carrier for the carriage of mail by sea based upon the basis of length, height, or width of cargo containers. Unless required by the physical handling limitations of the destination, no invitation for bids or request for proposals for the carriage of mail may specify the use of containers of any particular length, height, or width.

(e) For purposes of this section, the term "common carrier" means any common carrier, other than any ferryboat running on regular routes, engaged in the transportation by water of passengers or property between the United States (or any of its districts, territories, or possessions) and any foreign country, whether in the import or export trade, except that a cargo boat commonly referred to as an ocean tramp shall not be considered to be a common carrier.

TITLE 39, UNITED STATES CODE

Section 410 of that title

Application of other laws

(a) * * *

(b) The following provisions shall apply to the Postal Service:

(1)–(8) * * *

(9) Section 405 of the Merchant Marine Act, 1936, as amended.

(c)–(d) * * *

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